

*original filed 3/30/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TONDARLAIRD CURTIS

Petitioner,

vs.

THOMAS L. CAREY

Respondent.

No. C 05-4444 JF (PR)

ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 following his conviction, pursuant to a plea of nolo contendere for lewd or lascivious acts committed on a child under fourteen (Cal. Penal Code § 288(a)) and inflicting corporal injury on a spouse or co-habitant (Cal. Penal Code § 273.5). The Court found that the petition stated two cognizable claims and ordered Respondent to show cause why the petition should not be granted.¹ Respondent filed an answer addressing the merits of the petition. Although given an opportunity to do so, Petitioner did not file a traverse. After reviewing the papers and the underlying record,

¹ The Court dismissed Petitioner's claim that the prosecutor's theory of prosecution relied upon the testimony of Petitioner's wife and her daughter, which resulted in a miscarriage of justice because the testimony constituted perjury. Under California law, a nolo contendere plea removes every issue of fact from the case and authorizes the entry of a conviction. Therefore, a defendant who pleads guilty or nolo contendere cannot later raise in habeas corpus proceedings independent claims relating to the deprivation of constitutional rights that occurred before entry of the plea.

the Court concludes that Petitioner is not entitled to habeas corpus relief and will deny the petition.

I. BACKGROUND²

On or about and between January 25, 2003 and January 26, 2003, the defendant, who is 13-year old Jane Doe's stepfather, entered Jane Doe's bedroom while she was asleep. He sat on the edge of the bed, slipped his hand underneath her underwear and touched her vagina, skin to skin. When the victim woke up, the defendant removed his hand and left the room without saying anything. She then went to her mother and reported the incident, although she believed her mother was too asleep to understand what she was saying. The next morning, the victim again told her mother about the incident, at which time her mother, along with the victim, confronted the defendant. The defendant admitted the incident and promised he would never do it again. The police were not called at that time.

On an evening approximately two weeks prior to the above incident, the defendant gave Jane Doe a twenty dollar bill and told her it was for her personal use. He then asked her to pull down her pants and show him her "thing," referring to her vaginal/genital area. Jane Doe refused the request and ran away from him.

On February 18, 2003, a domestic violence incident occurred at 1330 Foxdale Loop #328 in San Jose. The defendant and the victim had been married for approximately five years. The victim and the defendant engaged in a verbal argument that turned physical when the defendant placed the victim in a headlock, twisted her wrist and ring finger, causing her finger to swell. The victim broke free from the defendant and tried to run upstairs; the defendant grabbed her and pulled her back down the stairs.

The defendant threw the victim on her back, straddled her, and reached down with both hands and strangled her. The victim tried to scream but could not breathe. The victim's youngest daughter saw the incident and screamed. At this time, the defendant released his grip and left the apartment building. The police were called.

The victim's 13-year old daughter, Jane Doe, told officers the defendant is always physically and verbally abusing her mother. Jane Doe told the officer that the defendant has hit her mother several times in the past. While Jane Doe was talking to the police about the domestic violence incident, she reported that the defendant had sexually assaulted her.

The victim's 11-year old daughter (Latoya) also told police she had witnessed other incidents of physical abuse by the defendant against her mother. Latoya told officers that on one occasion she remembered seeing her mother with a black eye, several bruises, and barely able to walk. Latoya told the police the defendant had never abused her.

After the defendant's arrest, the District Attorney's office received documented telephone conversations between the defendant and the domestic

² The relevant facts are taken from the Pre-Sentence Probation Report (Respondent's Answer, Exh. 3) at 3-4.

1 violence victim in this matter. The defendant attempted to dissuade his wife from
2 testifying in court, or cooperating with the police.

3 On January 9, 2004, Petitioner entered a plea of nolo contendere to lewd or lascivious
4 acts committed on a child under fourteen (Cal. Penal Code § 288(a)) and inflicting corporal
5 injury on a spouse or co-habitant (Cal. Penal Code § 273.5). Petitioner was sentenced to a prison
6 term of three years on count one and a concurrent term of two years on count two. Petitioner
7 filed two state habeas petitions in Santa Clara Superior Court, which were denied in written
8 orders dated October 6, 2004 and April 18, 2005. Petitioner filed a state habeas petition in the
9 state appellate court, which was summarily denied on June 2, 2005. Petitioner filed a state
10 habeas petition in the state supreme court, which was summarily denied on August 10, 2005.
11 Petitioner filed the instant federal petition seeking habeas relief on November 1, 2005.

12 II. DISCUSSION

13 A. Standard of Review

14 This Court will entertain a petition for writ of habeas corpus “in behalf of a person in
15 custody pursuant to the judgment of a State court only on the ground that he is in custody in
16 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

17 The petition may not be granted with respect to any claim that was adjudicated on the
18 merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision
19 that was contrary to, or involved an unreasonable application of, clearly established federal law,
20 as determined by the Supreme Court of the United States; or (2) resulted in a decision that was
21 based on an unreasonable determination of the facts in light of the evidence presented in the
22 State court proceeding.” 28 U.S.C. § 2254(d).

23 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state
24 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of
25 law or if the state court decides a case differently than [the] Court has on a set of materially
26 indistinguishable facts.” Williams (Terry) v. Taylor, 529 U.S. 362, 412-413 (2000). “Under the
27 ‘reasonable application clause,’ a federal habeas court may grant the writ if the state court
28 identifies the correct governing legal principle from [the] Court’s decisions but unreasonably

1 applies that principle to the facts of the prisoner's case." Id. at 413. "[A] federal habeas court
2 may not issue the writ simply because that court concludes in its independent judgment that the
3 relevant state-court decision applied clearly established federal law erroneously or incorrectly.
4 Rather, that application must also be unreasonable." Id. at 411.

5 "[A] federal habeas court making the 'unreasonable application' inquiry should ask
6 whether the state court's application of clearly established federal law was 'objectively
7 unreasonable.'" Id. at 409. In examining whether the state court decision was objectively
8 unreasonable, the inquiry may require analysis of the state court's method as well as its result.
9 Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003). The standard for "objectively
10 unreasonable" is not "clear error" because "[t]hese two standards . . . are not the same. The gloss
11 of error fails to give proper deference to state courts by conflating error (even clear error) with
12 unreasonableness." Lockyer v. Andrade, 538 U.S. 63, 75 (2003).

13 A federal habeas court may grant the writ if it concludes that the state court's
14 adjudication of the claim "results in a decision that was based on an unreasonable determination
15 of the facts in light of the evidence presented in the State court proceeding." 28. U.S. C. §
16 2254(d)(2). The court must presume correct any determination of a factual issue made by a state
17 court unless the petitioner rebuts the presumption of correctness by clear and convincing
18 evidence. 28. U.S.C. § 2254(e)(1).

19 **B. Petitioner's Claims**

20 1. Ineffective Assistance of Counsel

21 Petitioner claims that his trial counsel was ineffective because trial counsel "fail[ed] to
22 prepare adequate witness(es), alibi, or evidence(s) supporting Defense Counsel's tactical
23 defense" with respect to the two cases. Petition at 15.

24 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth
25 Amendment right to counsel, which guarantees not only the assistance of counsel, but that the
26 assistance be effective. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark
27 for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the
28 proper functioning of the adversarial process that the trial cannot be relied upon as having

1 produced a just result. Id.

2 In order to prevail on an ineffective assistance of counsel claim, petitioner must satisfy
3 two separate requirements: first, he must establish that counsel's performance was deficient, i.e.,
4 that it fell below an "objective standard of reasonableness" under prevailing professional norms.
5 Id. at 687-88. Second, he must establish that he was prejudiced by counsel's deficient
6 performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional
7 errors, the result of the proceeding would have been different." Id. at 694. A reasonable
8 probability is a probability sufficient to undermine confidence in the outcome. Id.

9 A defendant who enters a guilty plea on the advice of counsel generally may attack the
10 voluntary and intelligent character of the guilty plea only by showing that the advice he received
11 from counsel was not within the range of competence demanded of attorneys in criminal cases.³
12 See Hill v. Lockhart, 474 U.S. 52, 56 (1985); Tollett v. Henderson, 411 U.S. 258, 267 (1973);
13 United States v. Signori, 844 F.2d 635, 638 (9th Cir. 1988). A defendant must satisfy the two-
14 part standard set forth in Strickland. See Hill, 474 U.S. at 57-59; Iaea v. Sunn, 800 F.2d 861,
15 864-65 (9th Cir. 1986). Where the alleged error is a failure to investigate or discover potentially
16 exculpatory evidence, the determination as to whether the error "prejudiced" the defendant will
17 depend on the likelihood that discovery of the evidence would have led counsel to change his
18 recommendation as to the plea. This assessment will depend in large part on a prediction of
19 whether the evidence likely would have changed the outcome of the trial.

20 Relying upon Tollett, supra, Respondent maintains that because Petitioner pled nolo
21 contendere, he cannot raise a claim of ineffective assistance of counsel because the alleged
22 constitutional error arose prior to the plea. Resp. Memorandum of Points and Authorities at 5.
23 Without deciding this question, the Court has considered Petitioner's claim of ineffective
24 assistance of counsel on the merits and concludes that Petitioner is not entitled to relief.

25 Petitioner states generally that trial counsel failed to "question the potential witness(es)

27 ³ The decision whether or not to accept a plea offer is a critical state of the prosecution at
28 which the Sixth Amendment right to counsel attaches. Iowa v. Tovar, 541 U.S. 77, 80-81
(2004); Turner v. Calderon, 281 F.3d 851, 879 (9th Cir. 2002).

or victim's credibility" and trial counsel "failed to subpoena other evidence(s)." Petition at 16 (emphasis in original). However, Petitioner does not offer any explanation or make any factual showing as to why in the absence of these alleged failures counsel would have made a different recommendation as to the plea. Additionally, Petitioner does not specifically allege how counsel's actions affected his decision. As the state superior court found in denying Petitioner's initial attempt to show that his counsel was ineffective, "Petitioner herein has failed to establish a basis for relief. Petitioner has failed to present any evidence aside from self serving statements that he would not have pled." Resp. Exh. 5 (In Re Tondarlaird Curtis, Santa Clara Superior Court's Order, CC305988/CC312761, dated April 18, 2005) at 2. Likewise, in the instant proceeding Petitioner also fails to present any evidence of prejudice, aside from general statements.

Because Petitioner has failed to show that but for his counsel's actions the result of the proceeding would have been different, the state court's determination was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

2. Deprivation of Good Time Custody Credits

Petitioner alleges two errors regarding the calculation of his sentencing credits. First, he claims that the trial court failed to calculate his good time credits. Second, petitioner contends that it was inappropriate for him to receive an accrual rate of fifteen percent good time credit. Petition at 24-26.

If a state prisoner's time credits have been improperly computed, he may have a claim for denial of due process. See Haygood v. Younger, 769 F.2d 1350, 1355-58 (9th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986). Any deprivation of time credits allegedly impacting a prisoner's sentence generally may be remedied only by way of habeas corpus. See Young v. Kenny, 907 F.2d 874, 876-78 (9th Cir. 1989), cert. denied, 498 U.S. 1126 (1991); Toussaint v. McCarthy, 801 F.2d 1080, 1096 n.14 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987).

Petitioner contends that he did not waive his good conduct credits. Petition at 28.

1 However, according to the underlying record, during Petitioner's plea colloquy on August 25,
 2 2003, the prosecutor clearly stated that "[Petitioner] would waive ninety actual days [of pre-
 3 sentence custody] and whatever good times attendant to that" Resp. Exh. 1 (Reporter's
 4 Transcript dated August 25, 2003) at 3. Petitioner then stated that he understood the terms of the
 5 plea and agreed to them. Id. at 4.

6 Petitioner next alleges that it was inappropriate for him to receive an accrual rate of
 7 fifteen percent and for the trial court to "not honor his full amount of credit(s) that he served in
 8 the county jail." Petition at 24. However, the accrual rate of fifteen percent good time credit
 9 was proper given his plea of nolo contendere to lewd or lascivious acts on a child under fourteen,
 10 a violation of California Penal Code section 288(a). The Santa Clara Superior Court held that
 11 "Petitioner's credits were properly limited pursuant to [California] Penal Code § 2933.1 due to
 12 the nature of his crimes." Resp. Exh. 4 (In Re Tondarlaird Curtis, Santa Clara Superior Court's
 13 Order, CC312761/CC305988, dated October 6, 2004) at 1. Under California Penal Code section
 14 2933.1(a), "[n]otwithstanding any other law, any person who is convicted of a felony offense
 15 listed in subdivision (c) of Section 667.5 shall accrue no more than fifteen percent of worktime
 16 credit." Penal Code section 288(a), lewd and lascivious acts on a child under fourteen, is defined
 17 in section 667.5(c)(6) as a violent felony.


18 Based upon its review of the underlying record, the Court concludes that the state court's
 19 determination was not contrary to, or an unreasonable application of, clearly established
 20 Supreme Court precedent, nor was it based on an unreasonable determination of the facts in light
 21 of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

22 III. CONCLUSION

23 The Court concludes that Petitioner has failed to show any violation of his federal
 24 constitutional rights in the underlying state criminal proceedings. Accordingly, the petition for a
 25 writ of habeas corpus is denied. The Clerk shall enter judgment and close the file.

26 IT IS SO ORDERED.

27 DATED: 3/29/07

28 
 JEREMY FOGEL
 United States District Judge

1 A copy of this ruling was mailed to the following:

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